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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 18

CHARLES McLAURIN,

Petitioner,

—v.—

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHARLES McLAURIN,

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—v.—

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 15, 1968.

Opinions Below

The opinion of the United States District Court for the Northern District of Mississippi denying petitioner's application for a writ of habeas corpus is reported at 279 F. Supp. 220 (N. D. Miss. 1967) and is set forth in the Appendix, pp. 4a-15a, *infra*. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit, affirming on the District Court's opinion, is unreported and is set forth in the Appendix, p. 1a, *infra*.

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The opinion of the Supreme Court of Mississippi affirming petitioner's conviction on direct appeal is reported at —— Miss. ——, 187 So. 2d 854 (1966) and is set forth in the Appendix, pp. 16a-28a, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered October 15, 1968 (R. 269; App., pp. 2a-3a, *infra*).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1) to review the Court of Appeals' affirmance of a district court order denying a petition for writ of habeas corpus brought pursuant to 28 U. S. C. §2241 (c)(3).

Question Presented

Is the Mississippi breach of the peace statute, Miss. Code Ann. §2089.5 (1966 Supp.), unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Mississippi:

> Miss. Code Ann. §2089.5 (Supp. 1966)—Disturbance of the public peace, or the peace of others.

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1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

Statement

Petitioner Charles McLaurin seeks review of his conviction and sentence of six months' imprisonment by the State of Mississippi for a speech he made in 1963 while a young Negro civil rights worker in Greenville, Mississippi.

On July 1, 1963, petitioner attended the trial of two Negro girls in the Police Court of the City of Greenville. The girls stood charged with disorderly conduct because they had refused to leave a traditionally segregated public park when the police, fearing violence from a crowd of white persons, ordered them to do so. The trial was attended by approximately 300 persons, about half of them Negroes (R. 37). During the trial, petitioner attempted to sit on the side of the courtroom customarily reserved for whites, but he was ordered out of that section (R. 37, 44-46, 48-50, 104-05). He left the courtroom and protested the segregated seating pattern to Police Chief William C. Burnley, Jr., respondent herein (R. 84-85, 105).

His protest was futile, and he was denied readmission to the courtroom (R. 105). Petitioner then left the municipal building, which housed the municipal court and the police station, and stood outside on the sidewalk waiting for the trial to end (R. 106). About 50 Negroes were standing outside the building, having been denied admission to the courtroom because the Negro side was completely filled (although there was some space on the white side) (R. 106).

The girls were convicted by the municipal court.[1]

As the spectators left the municipal building, petitioner began to address them.

A. *Testimony as to the Content of Petitioner's Speech.*

What petitioner said was the subject of testimony by three Greenville police officers and petitioner.

Arresting Officer Willie Carson testified:

> McLaurin began to talk protesting the Court's decision in words like, what are you going to do about it; you going to take this; it ain't right . . . (R. 39).
>
> • • • • •
>
> He said it was wrong—segregation was wrong—what we going to do about it. Mostly, he was protesting the Judge's decision (R. 42).
>
> • • • • •
>
> He was on the outside—I said, preaching because my experience in the words he was using and waving and

[1] In 1965, their convictions were reversed by the Mississippi Supreme Court. *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965), and *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

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shouting I said, I told him he couldn't preach out on the streets (R. 52).

• • • • •

. . . [H]e said this, what you going to do about this; this is wrong, the white Caucasian, this law is wrong; you going to take it; you going to let them get away with it. I heard those words there, and then the people began to just come in.

Q. Now, was the defendant cursing? A. No, I didn't hear him curse.

Q. He didn't use any profane language, if he did you didn't hear him? A. No (R. 53).

Greenville Police Captain Harvey Tackett testified:

He started waving his hands, shouting real loud to the people that were walking on. And, they, most of them, immediately turned and came back around him. He then left the sidewalk and jumped up on the steps of the Police Station and continued to shout and holler, ask people, you see what's happening, what you going to do about it, and such phrases as that (R. 64).

• • • • •

Q. Now, did you hear the defendant use any kind of vulgar language of any kind? A. I did not.

• • • • •

Q. . . . Did he do anything that would appear to you to have been vulgar by his actions? . . . A. No he didn't (R. 73).

Greenville Police Chief William C. Burnley, Jr. testified:

Q. What was he saying? A. What are you going to do? Are you going to let this happen? Statements of that type (R. 77).

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Petitioner testified:

. . . I moved out in front of the Municipal building. As the people was coming out of the building—well, they was coming out just looking as if, you know—some of the people seemed to be kinda shocked as to the conviction of the people, as if they thought they wasn't going to be convicted, and so, people were standing around out there. And so, at that time I felt that they didn't really know what had happened and what was going on. Some people had had to stand on the outside that could have gone into the Courtroom and taken a seat had it not been for the system they were using to seat people, others that were there didn't really know why these kids had been convicted. So, at this time I felt that the 1st Amendment of the United States Constitution gives the right of freedom of speech and peaceful assembly. The people were peacefully assembled out there, and so, I made a few statements. My job is voter registration, to get Negroes registered to vote. And so, then, I started trying to get the attention of the people to tell them that by registering and voting this couldn't have happened. And, at this time, Officer Carson, as I started to talk, came up and—well, he caught me by the shoulder, took me by my arm, and he said, you can't make a public speech without a permit, you cannot make a public speech in front of the building without a permit (R. 107).

• • • • •

. . . And, at that time—the time that I was out there Officer Carson took me by the arm then, and I continued to talk as he carried me in. I was saying dif-

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ferent things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50 per cent of the population is Negro and that they could have used the park or any other thing had they been registered voters (R. 108).

• • • • •

I meant that if they were registered—if the people would register to vote, were to get in line and exercise their duties and responsibilities as citizens, as Negro citizens, and as citizens of the United States, they could change some of these things. They could change the policy of being arrested in a park that they paid for as well as any other people and that there wouldn't be such parks that was designated for Whites and for Negroes. This was my intentions and that being arrested there, I felt that they was inciting a riot then, if the people—if the policemen—there were policemen out there, and if at any time they felt that the crowd was going to get unruly, it was their job to move the crowd—there was no attempt made to dispurse [sic] the crowd. Instead, I was arrested for making—for saying what I was saying, you know, I was arrested not—I don't think there was any question as to whether, thought whether the crowd—what would they do, tear down the building, you know. Surely, I didn't think they were going to attack me or attack the policemen there, because we have advocated non-violence, not violence—non-violence is our way of doing things. And, the only thing that I had in mind was to get them to register to vote and to realize what was happening, and I felt that I had a right to do this under the 1st Amendment.

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Q. I take it then, that you did not at any time make any statements or of any kind to encourage them to attack anybody, did you? Did you tell them to rush inside and attack the Judge for his decision? A. No, I did not. In fact I never really finished—I was dragged away before I could get out what I wanted to get out. Each time—as I was carried—as I was being carried into the building, I was talking and I never really made my point (R. 109-10).

B. *Testimony as to the Context of Petitioner's Speech.*

The three police officers and petitioner also testified as to the reaction of the crowd to petitioner's speech.

Officer Carson testified:

Q. And, what was the crowd doing? A. They were talking. Everybody seemed interested in what he was saying.

Q. What was the tempo [sic] of that crowd? A. Well, at the time as I could judge, everybody was getting disturbed.

Q. And what do you mean by disturbed, Willie? A. They didn't like the decision—of what he was talking—what he was telling them (R. 40).

* * * * *

Q. Just tell—just describe that situation as best you can, Willie. What you saw and what was going on in your presence after the defendant began talking to those people? A. Well, my experience in my opinion was a very tense situation and had it kept on anything could happen.

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Q. How do you know it was tense? A. We could tell the crowd and mumbling in the crowd . . . (R. 41-42).

• • • • •

Q. Did you hear anybody in the crowd hollering? A. Oh, you could hear them talking back and hear them saying, it ain't right.

Q. How's that? A. You could hear voices—it ain't right, you know.

Q. But, you didn't hear any oral threats made by anybody in the crowd, did you—on anybody's life? A. No, I didn't.

Q. Or property, you didn't hear that, did you? A. No, I didn't (R. 60-61).

Captain Tackett testified:

They seemed to be crowding more and more around the door of the Police Station and the mumbling and all began to get louder. It seemed as though they were going to try to take the situation in their own hands (R. 66).

• • • • •

Q. I believe you said that you heard some sort of muttering [sic] among the various people in the crowd, is that correct? A. That's right.

Q. And, I believe you told the Court you couldn't understand what they were saying? A. I could not.

Q. So you couldn't tell the crowd was saying, let's get them? A. No, I couldn't.

Q. Or, let's go get that judge? A. I could not. I could say what I heard the defendant McLaurin say.

Q. . . . [D]id you observe or make any observation of anybody in the crowd was armed at the time? A. I didn't see anyone.

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Q. Was the crowd hooping, hollering and yelling when they were in that vicinity? Were the crowd themselves doing a lot of hooping and yelling? A. No, they wasn't (R. 71-72).

Police Chief Burnley testified:

Q. Did you hear what the crowd was saying? A. No, it was a general mumbling, utterance. I couldn't distinguish anything they were particularly saying.

Q. So then, you couldn't tell the Court, then, that there were people in the crowd making any threatening statements or anything like that? A. Well, the general demeanor of the crowd, the appearance of the crowd at a tense situation like that would automatically inform me that it was a tense and sticky situation.

Q. But, you didn't hear any verbal threats? A. No, I did not (R. 81).

Petitioner testified:

Q. Did the crowd appear to be angry and in a tense, angry mood? A. I feel that the crowd was sorta upset as to the outcome of the trial, but certainly the words that I was using wouldn't have caused them to jump—to go in there and try to beat up the Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified.

Q. Well, it wouldn't be justified in any— A. Any place—but they know better—there are certain things that they know (R. 110-11).

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Q. Now, as they came out, you tell this jury that the Negroes that you observed seemed shocked, is that correct? A. Right.

Q. And, they seemed upset? A. Right.

Q. And, that they were shocked and upset at what had taken place in the building, is that correct? A. Yes.

Q. And, that's what you were talking to them about, is it not? A. That's right.

Q. And, that's what you ask them, what are you going to do about it, is that correct? A. Not in the way you say it, no.

Q. Well, that's what you told them, isn't it? A. I wanted to know what would they do to get to try to change—what would they do to register to vote. I would have brought these things out had I been given the opportunity (R. 120).

• • • • •

I was the one that was standing up there doing the talking and I at no time felt that these people were going to attack me. These were people that I had talked with before, people that I know as well as my own people. I didn't feel that they were going to come up and beat me up, you know, do me any harm, and I didn't feel the words that I was saying, I never directed them to go in and get anybody else. I felt that if it was a tense situation out there that these people would—first of all they knew, some of them, that the kids had tried to use the park. They needed some kind of idea as to what steps to take. They were up-set; they were restless. The expressions on their faces characterized by restless energy, that they

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felt that something should be done. But, then all it needed was a leader, and I was going to try to show them where they could register their protest with the Mayor, and I didn't feel that they were going to come up and attack me (R. 202).

• • • • •

Q. State whether or not the statement you were making was for the purpose of relieving the tense situation, if any? A. Certainly if they knew what was going—I always felt that if people know what is going on, then they will know what steps to take, so I was telling them what had happened, and I felt that this was leading them, and one of the things I would have advocated was that they all come together in a meeting later, a mass meeting of some type at church or some hall here and we discuss plans to go out and talk with the City officials, I feel that this would have relieved the tension there, and we would have all gotten together and left the area (R. 203).

Officer Carson told petitioner that he could not continue speaking without a permit (R. 42) and, when petitioner continued speaking, placed him under arrest (R. 43). Carson started to take petitioner into the municipal building, but petitioner tried to pull back (R. 43, 205-06); Carson, who outweighed petitioner by 60 pounds (R. 35, 203), testified, "I finally manhandled him on up through the door" (R. 43).[2]

[2] Once inside the police station, petitioner fell to the floor and lay there motionless (R. 207); he was picked up and carried to the Sergeant's desk for booking, after which he voluntarily got up (R. 207).

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After petitioner's arrest, the crowd was easily dispersed (R. 68, 78).

C. *Proceedings Below.*

Petitioner was charged with breach of the peace, in violation of Miss. Code Ann. §2089.5 (1966 Supp.), p. 2 *supra*, and with resisting arrest, in violation of §252 of the Code of Ordinances of the City of Greenville.[3] He was tried by a jury in the County Court of Washington County on September 16 and 20, 1963; was convicted;[4] and was sentenced to pay a fine of $100 and serve a term of 90 days in the city jail on each charge (R. 24-25; 145-46). Petitioner's convictions were affirmed by the Circuit Court of Washington County and, on June 13, 1966, by the Supreme Court of Mississippi, —— Miss. ——, 187 So. 2d 854 (1966), App. pp. 16a-28a, *infra*.

On January 9, 1967, this Court denied petitioner's petition for writ of certiorari, three Justices dissenting, 385 U. S. 1011.

Thereafter, on February 14, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Mississippi alleging, in essence, that his confinement[5] by respondent

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[3] Appellant's conviction for resisting arrest must fall if his breach of the peace conviction falls because the trial court correctly charged the jury that appellant could not be convicted of resisting arrest unless he was found to have committed a breach of the peace in the arresting officer's presence (R. 142-43, 145). See 187 So. 2d 860-61; *Wright* v. *Georgia*, 373 U. S. 284, 291-92 (1963); *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965).

[4] Earlier, on July 3, 1963, petitioner was tried and convicted on these charges in the Municipal Court of the City of Greenville.

[5] Subsequent to the filing of his petition, petitioner was released on bond pending decision by the district court (R. 9-10). He remained enlarged on $1500 bond pending appeal to the Court of Appeals by order of the district court (R. 264-65). An application

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punished him for the exercise of his federal constitutional rights of free speech, assembly and petition (R. 3-7). The case was submitted to the district court on the record made in the state court (R. 237-38, 240-41). On December 29, 1967, the district court entered a memorandum opinion holding that Miss. Code Ann. §2089.5 (1966 Supp.) was not unconstitutional on its face or as applied to convict petitioner for his speech (R. 239-53; 279 F. Supp. 220; App., pp. 4a-15a, *infra*). Accordingly, the petition for writ of habeas corpus was denied (R. 254-55).[6]

On October 15, 1968, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of the petition for writ of habeas corpus in a summary *per curiam* opinion (R. 268; App., p. 1a, *infra*).

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to the Court of Appeals to stay the Court's mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure will be filed shortly.

[6] The district court issued a certificate of probable cause on January 15, 1968 (R. 263-64), and a timely notice of appeal was filed January 16, 1968 (R. 265).

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Reasons for Granting the Writ

Certiorari Should Be Granted to Review the Court of Appeals' Holding That the Mississippi Breach of the Peace Statute, Miss. Code Ann. §2089.5 (1966 Supp.), Is Compatible With the First and Fourteenth Amendments. The Case Should Be Set for Argument With *Gunn* v. *University Committee to End the War in Viet Nam*, O. T. 1968, No. 269, in Which This Court Will Review a Ruling That the Texas Breach of the Peace Statute Is Unconstitutional.

Petitioner was convicted on a general verdict of the charge of "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (R. 18, 24-25). The charge and verdict implicate the following three prohibitions of §2089.5, whose constitutionality under the First and Fourteenth Amendments petitioner challenged below and challenges here:[7]

1. "Any person who disturbs the public peace, or the peace of others, by . . . loud . . . or offensive . . . language . . . shall be guilty of a misdemeanor. . . ."

2. "Any person who disturbs the public peace, or the peace of others, . . . by conduct . . . calculated to

[7] Because petitioner was convicted by a general verdict, if any of these prohibitions cannot constitutionally be applied to punish petitioner's speech, then his conviction must fall. *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291-293 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). Cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 92 (1965).

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provoke a breach of the peace . . . shall be guilty of a misdemeanor. . . ."

3. "Any person who disturbs the public peace, or the peace of others, . . . by conduct which may lead to a breach of the peace . . . shall be guilty of a misdemeanor. . . ."

Petitioner submits that none of these prohibitions is drawn with the narrow specificity required to punish speech of the kind which this record reveals. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Here, as in *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940), we have "a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." Consistently and repeatedly this Court has held that prohibitions rationally indistinguishable from Mississippi's §2089.5 could not constitutionally be applied to forms of speech rationally indistinguishable from petitioner McLaurin's. *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-11 (1940); *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5 (1949); *Edwards* v. *South Carolina*, 372 U. S. 229, 236-38 (1963); *Cox* v. *Louisiana*, 379 U. S. 536, 551-52 (1965); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87 (1965); *Ashton* v. *Kentucky*, 384 U. S. 195, 200-201 (1966).

There is a common infirmity running through these prohibitions punishing speech thought to be "offensive" or "calculated to provoke," or "which may lead to," a breach of the peace. It is the subjection of citizens' freedom of speech to censorship under the impressionistic and variable standards of a policeman's calculation of public temper, thus "allow[ing] persons to be punished merely for peace-

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fully expressing unpopular views" (*Cox* v. *Louisiana, supra,* 379 U. S. at 551). This rationale was developed in Mr. Justice Black's concurring opinion in *Cox,* in which he condemned statutes allowing a policeman to curb a citizen's right of free speech

> whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. Compare Yick Wo v. Hopkins, 118 U. S. 356, 369-370, 20 L ed 220, 226, 6 S Ct 1064. This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree (379 U. S. at 579).

We think it hardly necessary to demonstrate that two of the three prohibitions of Miss. Code Ann. §2089.5 employed against petitioner cannot pass constitutional muster under this principle. The points seem settled, if this Court's recent decisions can settle the law of the Constitution. In *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), this Court reviewed its cases dealing with language virtually identical to Mississippi's proscription of conduct "calculated to provoke a breach of the peace":

> These decisions [*Edwards* v. *South Carolina; Cox* v. *Louisiana*] recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a par-

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> ticular person or a particular group, not an appraisal of the nature of the comments per se [and is thus unconstitutional under the First and Fourteenth Amendments] (384 U. S. at 200).

The proscription of conduct "which may lead to a breach of the peace" can fare no better. *Cox* v. *Louisiana, supra,* voided convictions for speech conduct similar to petitioner's under a Louisiana breach-of-the-peace statute that is identical in its operative language to §2089.5. The Louisiana statute was held facially unconstitutional on reasoning that plainly applies to and equally condemns §2089.5. The district court below sought to distinguish *Cox* on the theory that the construction of §2089.5 by the Mississippi courts differed from the construction by the Louisiana courts of the identical Louisiana statutory language (R. 248-49; 279 F. Supp. at 225; App., p. 11a, *infra*). But the jury charge authorized petitioner's conviction on grounds which are precisely those condemned in *Cox* (R. 20-21); and the Mississippi Supreme Court, in affirming petitioner's conviction, did not distinguish *Cox* by purporting to construe its statute differently from the Louisiana law there struck down. It found only that the "factual situation involved in this case is entirely different. . . ." 187 So. 2d at 860, App., p. 28a, *infra.*

Whatever factual differences there may be—and we submit that they are inconsiderable—petitioner's conduct, like Cox's, was entirely peaceful and non-inflammatory. If his acts were criminal, they were so because §2089.5 penalized incidents of them that were identical to the incidents on which Cox's unconstitutional conviction also rested.

Cox had addressed a group of about 2,000 young Negro students on the sidewalks between the State Capitol and

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the courthouse in Baton Rouge, Louisiana. His was a speech of protest (379 U. S. at 542-43):

> [Cox] gave a speech, described by a State's witness as follows:
>
> He said that in effect it was a protest against the illegal arrest of some of their members and that other people were allowed to picket . . . and he said that they were not going to commit any violence, that if anyone spit on them, they would spit back on the person that did it.
>
> Cox then said:
>
> All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.

The sheriff testified that, in his opinion, constitutional protection for the speech ceased "when Cox, concluding his speech, urged the students to go uptown and sit in at lunch counters" (379 U. S. at 546), but this Court disagreed:

> The Sheriff testified that the sole aspect of the program to which he objected was "[t]he inflammatory manner in which he [Cox] addressed that crowd and told them to go on uptown, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour." Yet this part of Cox's speech obviously did not deprive the demonstration of its pro-

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tected character under the Constitution as free speech and assembly (379 U. S. at 546).

Petitioner McLaurin's speech was, like the speech protected in *Cox*, a stirring and vigorous encouragement to his listeners to assert their federal rights; it was no invitation to violence. Even when the record is viewed most favorably to the prosecution, it is apparent that petitioner's speech did not amount to the "fighting words" held constitutionally unprotected in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).[8] Nor did his speech present a case like *Feiner* v. *New York*, 340 U. S. 315 (1951), where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" (340 U. S. at 321).[9] In his speech of 8 or 9 minutes (R. 244; 279 F. Supp. at 223, App. p. 8a, *infra*), even his most forceful statements, viewed in their context, were neither an explicit incitement nor a subtle invitation to riot. See pp. 4-12, *supra*. All that petitioner urged his listeners to "do" was to register to vote so that illegal segregation would end in Washington County. All that his listeners did was to listen.

It is true, as the courts below found, that appellant spoke in a "loud voice" (R. 243; 279 F. Supp. at 223; App. p. 7a, *infra*). But the Mississippi prohibition of "loud or offen-

[8] The speaker in *Chaplinsky* met the following test developed by the New Hampshire Supreme Court: "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile" (315 U. S. at 573).

[9] The speaker in *Feiner* urged Negroes to take up arms against whites (340 U. S. at 317). There is little indication what statutory language was there invoked and no indication that the issue of a statutory invalidity was raised. See 340 U. S. at 318-19.

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sive language" cannot reasonably be distinguished from the proscription of "loud and vociferous language" in the Texas breach of the peace statute struck down in *University Committee to End the War in Viet Nam* v. *Gunn* (W. D. Texas, No. 67-63-W, three-judge court, decided April 9, 1968). On October 14, 1968, this Court noted probable jurisdiction of the State's appeal in that case. *Gunn* v. *University Committee to End the War in Viet Nam,* O. T. 1968, No. 269. The district court in *Gunn* considered the Texas statute against a background of several state court decisions attempting to give it a narrowing construction. Nevertheless, the court concluded, in language precisely applicable here (slip op., p. 9):

> It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing the statute on its face makes a crime out of what is protected First Amendment activity. This is impermissible.

In the present case, the sole attempt at limiting construction of Miss. Code Ann. §2089.5 consists of the following language of the Mississippi Supreme Court affirming petitioner's conviction on direct appeal (187 So. 2d 854, 859; App., pp. 25a-26a, *infra*):

> Appellant contends that he has been convicted of expressing unpopular views, and the construction of Mississippi Code Annotated section 2089.5 (Supp. 1964) by the trial court comes within the rule announced in *Terminiello, supra.* This directs our attention to the

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> construction placed upon the statute by the trial court. This is reflected by the instructions to the jury as requested by the City and by the appellant. The court instructed the jury that if appellant was arrested for public protest against racial segregation, then they could not find the defendant guilty. The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional.

The district court below held that this language brought the statute within constitutional bounds (R. 248-49; 279 F. Supp. at 225; App., p. 11a, *infra*):

> In the case here, the statute, as interpreted by the state court, permits a conviction for speech only if that speech was calculated to lead to a breach of the peace or was of such a nature as ultimately led to a breach of the peace. There can be no conviction for *peacefully* exercising the right of free speech. This is consistent with the principle that one may be found guilty of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. *Cantwell* v. *State of Connecticut, supra.* Under the statute here in question, so long as the speech was *peaceful*—regardless of whether it in-

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> vited dispute, brought about a condition of unrest or stirred people to anger—a conviction was not warranted. (Emphasis in original)

But this interpretation—if the Mississippi Supreme Court's defense of the statute can be taken as an "interpretation" in the sense of limiting the statute's scope—obviously fails by a wide margin to restrict §2089.5 within permissible First Amendment bounds. The interpretation nods tactfully to the First Amendment but does nothing operatively to protect it. On one hand, a speaker can be arrested and convicted if the arresting officer and the jury think that he has made statements, however unintentionally, likely to disturb good order. On the other hand, it is said that there can be no conviction of those who "speak freely within the framework of the law" (in the words of the Mississippi Supreme Court) or of those who are "peacefully exercising the right of free speech" (in the words of the district court below). The guidance thus provided to the arresting officer and the jury is minimal; the statutory language simply leaves everything to their discretion. The long slope between "free speech" and "loud or offensive language" remains unmarked by any concrete or even helpfully approximative boundary. As "interpreted," §2089.5 remains serviceable to justify petitioner's arrest and conviction on the grounds that the arresting officer and the jury thought his speech too critical of the Police Court's decision,[10] and therefore "offensive" and "nonpeaceful"; *or* on the grounds they thought it simply too loud.

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[10] The district court found that petitioner, in his speech, "denounced [the girls'] convictions as 'bad' " (R. 243; 279 F. Supp. at 223; App., p. 7a, *infra*). The convictions *were* bad, but were not reversed until two years later. See note 1, *supra*.

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Not only *Gunn*, but *Carmichael* v. *Allen*, 267 F. Supp. 985, 997-99 (N. D. Ga. 1967), bespeaks the invalidity of this Mississippi proscription of offensive language. In *Carmichael*, the three-judge court invalidated a prohibition of "vulgar" language under the principles of *Cantwell* v. *Connecticut*, *supra*, and *Cox* v. *Louisiana*, *supra*, saying (267 F. Supp. at 998-99):

> Moreover, it takes no elaboration to demonstrate that the term 'vulgar' in connection with 'language' . . . leaves 'to the executive and judicial branches too wide a discretion in the application' of the law. It too readily permits them to make a crime out of what is protected activity.

CONCLUSION

In sum, petitioner has been convicted in exactly the manner forbidden by this Court's decisions from *Cantwell* and *Terminiello* through *Cox* and *Ashton*, under a statute written and construed in language which is virtually identical to that condemned by those decisions. The present case thus poses the essential issue whether this Court's pronouncements will be enforced as viable protections of the First Amendment or ignored as unserviceable to suit police convenience. On its post-conviction record, it also affords additional perspectives on the issue of statutory overbreadth and vagueness presently pending before the Court in *Gunn*.

The conduct in petitioner McLaurin's case was speech, pure and simple. Uncomfortable as it may have made the arresting officers, it was consistent with our tradition "that debate on public issues should be uninhibited, robust and

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wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). The protection of that tradition cannot be abandoned to the moment-to-moment opinions of a policeman on his beat.

For the foregoing reasons, petitioner prays that the petition for writ of certiorari be granted and that the case be set for argument with *Gunn* v. *University Committee to End the War in Viet Nam*, O. T. 1968, No. 269.

Respectfully submitted,

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APPENDIX

In the United States Court of Appeals
for the Fifth Circuit

In re

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 25762

CHARLIE McLAURIN,

Appellant,

versus

WILL **APPENDIX**, Jr.,
Custodian of the Greenville City Jail,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 15, 1968)

Before GOLDBERG and AINSWORTH, Circuit Judges,
and STEGER, District Judge.

PER CURIAM: The memorandum opinion [illegible] this cause by the District Court and reported in 279 F. Supp. 220 (N.D. Miss. 1967) is hereby approved and [illegible] judgment denying the petition for writ of habeas corpus [illegible].

APPENDIX

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APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25765

CHARLES McLAURIN,

Appellant,

versus

WILLIAM C. BURNLEY, JR.,
Custodian of the Greenville City Jail,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 15, 1968)

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge.

PER CURIAM: The comprehensive memorandum opinion filed in this cause by the District Court and reported in 279 F. Supp. 220 (N.D. Miss. 1967) is hereby approved, and the judgment denying the petition for writ of habeas corpus is AFFIRMED.

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25765

D. C. Docket No. GC 678

CHARLES McLAURIN,

Appellant,

versus

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Charles McLaurin, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 15, 1968

Issued as Mandate:

Opinion of the United States District Court for the Northern District of Mississippi

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

No. GC678

CHARLES MCLAURIN,

Petitioner,

v.

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

MEMORANDUM OPINION

After petitioner's arrest and conviction in the Police Court of Greenville, Mississippi, for breach of the peace (Miss. Code Ann. § 2089.5) and resisting arrest (Code of Ordinances, City of Greenville, § 252 Rev. Ed. 1938), there was an appeal to the County Court of Washington County and a de novo separate jury trial on each of these charges with verdicts of guilty; an appeal to the Circuit Court of Washington County, Mississippi, which affirmed petitioner's convictions on the records made in county court; an appeal to the State Supreme Court, which also affirmed [*McLaurin* v. *Greenville*, 187 So.2d 860 (Miss. 1966)]; and,

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the filing of a petition for a writ of certiorari with the Supreme Court of the United States, which was denied [*McLaurin* v. *Greenville*, 385 U.S. 1011, 17 L. Ed. 2d 548 (1967)] (with three judges dissenting). Now in spite of pronouncements that a criminal case should some time reach a final conclusion,[1] petitioner once again has challenged the validity of his convictions and, apparently, still is convinced that he has not been afforded due process of law. The federal issues here presented are substantially the same as those presented to the United States Supreme Court in the petition for writ of certiorari, but the denial thereof cannot be interpreted as an expression of that court's opinion on the merits. *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953).

On February 14, 1967, the petitioner, Charles McLaurin, filed a petition for a writ of habeas corpus in this court and named as respondent thereto the custodian of the Greenville City Jail, located in Greenville, Mississippi.[2] On that same date, the respondent was ordered to show cause why the relief prayed for in said petition should not be granted. The respondent seasonably filed its response, and the issues presented by the petition are now before the court on the record made in the state trial court, the briefs submitted in the United States Supreme Court on petitioner's application for a writ of certiorari, additional briefs submitted in this court and a stipulation which was filed on September 7, 1967. An evidentiary hearing was initially sought by the petitioner, but later, when such a hearing was set, that request was withdrawn, and the case

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[1] E.g., *Allison* v. *Holmon*, 326 F.2d 294 (5 Cir. 1963).

[2] Who is the Chief of Police.

was submitted on the record made in state court, in lieu of any further evidentiary hearing in this court.

The entire record aforementioned has been carefully considered. It is clear that the merits of the factual dispute were adequately developed and resolved in the state court, and the conclusions therefrom are supported by the record; that the state employed an adequate fact-finding procedure; that no allegation of newly discovered evidence has been presented and that no reason here exists which indicates that the petitioner did not have a full and fair factual hearing throughout his state litigation. This court now independently so finds. Consequently, no further evidentiary hearing under the standards set forth in *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), is indicated—a fact which is admitted by petitioner.

In the Supreme Court of Mississippi, by assignment of error, the petitioner alleged: that the state breach-of-the-peace statute (Miss. Code Ann. § 2089.5) is unconstitutional, that his convictions of the subject offenses constituted punishment for the exercise of free speech and that his convictions were founded upon no evidence of guilt.[1] These precise contentions are again presented here, and though they were expressly rejected by the State Supreme Court, it is this court's duty, in considering the present petition for a writ of habeas corpus, to independently apply applicable federal law to the state court findings of fact, if those fact findings were there "reliably found". *Townsend* v. *Sain*, supra, 9 L. Ed. 2d at 789. No "vital flaw having been found in the process of ascertaining such facts in the state courts" [*Brown* v. *Allen*, supra, 97 L. Ed.

[1] Other assignments of error presented to the State Supreme Court have not here been seriously urged and are considered abandoned.

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at 514 (opinion of Frankfurter, J.)], this court is authorized to and does place much reliance upon that court's factual determinations. *Ibid.* Such facts are fully reported at —— Miss. ——, 187 So.2d 854, and are only repeated where necessary here.

Immediately following the trial and convictions[4] of two Negro girls in the Police Court of Greenville, McLaurin began exhorting a crowd of about 200 people, predominately Negro, which had gathered outside the courthouse. In his speech, which was described as being in a "loud voice", he denounced these convictions as "bad" and challenged the crowd with "what they intended to do about it". Obviously, many of those present disagreed with these convictions. The crowd was described as "getting disturbed" and as engaged in "mumbling and muttering". The situation was said to be "tense".

One Negro police officer testified that "in my opinion [it] was a very tense situation and had it kept on anything could have happened". Another officer testified that during petitioner's talk the crowd "seemed to be crowding more and more around the door of the building and the mumbling began to get louder". It seemed as though they were "going to try to take the situation in their own hands". The Chief of Police of Greenville, Mississippi, testified that in his opinion "at any moment we could have had a riot or some violence", because the crowd was "answering him [the petitioner] and becoming emotional".[5] The petitioner, on cross-examination, conceded that when he began to address the crowd they were "sort of upset" and seemed "shocked and confused" at the aforementioned convictions.

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[4] These convictions were later set aside on appeal.

[5] All the police officers who testified were experienced law enforcement officials who had on previous occasions had experience in dealing with mobs.

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The testimony further shows that after some eight or nine minutes of talking, the petitioner was told that he would have to stop speaking unless he obtained a permit. Petitioner purportedly ignored this warning, kept talking and was placed under arrest. When the police officers started taking petitioner inside the building, he "kept pulling back", and the arresting officers were forced to manhandle him to get him into custody. One arresting officer testified that it required all his strength to remove the petitioner from the scene. There is also testimony that petitioner during the course of his being arrested went "limp".

Following the arrest of the petitioner, the crowd allegedly remained in attendance in the immediate area of the municipal building and was later dispersed by a number of police officers described by one witness as a "riot squad".

In county court on the aforementioned jury trials, with testimony of this nature presented and being instructed by the court that "if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty", a trial jury found the petitioner guilty of violating § 2089.5, Miss. Code Ann. (1966 Supp.). Another trial jury also found him guilty of resisting arrest under § 252, Code of Ordinances, City of Greenville, Rev. Ed. 1938.[6]

I.

It is initially asserted as the basis for the present habeas petition that the petitioner was convicted under an unconstitutional state statute. The applicable statute provides:

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[6] This ordinance provides, in part, that:

> Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, . . . shall be guilty of a misdemeanor.

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> Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by the intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor . . . .
>
> Miss. Code Ann. § 2089.5.

If this position is well taken, the foundation of the whole proceedings are affected, for "an unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Fay* v. *Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

It is now settled that "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms". *NAACP* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405. The State of Mississippi has an obvious interest in the preservation and protection of peace and good order within her borders. The Supreme Court has stated that:

> This court respects, as it must, the interest of the community in maintaining peace and order on its streets.
>
> *Feiner* v. *New York,* 340 U.S. 315, 95 L. Ed. 297 (1951).

The statute now under attack evinces a legislative judgment that speech which is either calculated to lead to a breach of the peace or which may lead to a breach of the

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peace should be regulated. "Such a declaration of the state's policy [if narrowly drawn to prevent the supposed evil] would weigh heavily in any challenge of the law as infringing constitutional limitations." *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L. Ed. 1213 (1940). It has been stated that:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts *and words* likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. (Emphasis added.)
>
> *Cantwell* v. *Connecticut,* supra, 84 L. Ed. at 1220.

Petitioner contends that this statute is unconstitutional in its overly broad scope. During this litigation, the state trial court instructed the jury, in effect, that this statute could not be utilized to punish the petitioner for peacefully protesting racial segregation. The Supreme Court of Mississippi has, on at least two occasions, expressly recognized its duty to construe state statutes in such a manner so as to insure that they will not infringe upon any person's constitutional rights. *McLaurin* v. *Greenville,* supra; *Bolton* v. *Greenville,* —— Miss. ——, 178 So.2d 667 (1965). This court "can only take the statute [here challenged] as the state courts read it" [*Terminiello* v. *Chicago,* 337 U.S. 4, 93 L. Ed 1131 (1949)]; the interpre-

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tation of this statute and policy pronouncement by the state court distinguish this case from the cases of *Cox* v. *Louisiana,* 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965) and *Edwards* v. *South Carolina,* 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963), cited by petitioner as supporting his position.

In *Cox* and *Edwards,* the state courts defined "an offense so as to permit convictions of the petitioners if their speech stirred people to anger, invited public dispute, or brought about a condition of unrest". 9 L. Ed. 2d at 697. "A condition resting on any of these grounds," said the court, "cannot stand." *Ibid;* see also *Terminiello* v. *Chicago,* supra.

In the case here, the statute, as interpreted by the state court, permits a conviction for speech only if that speech was calculated to lead to a breach of the peace or was of such a nature as ultimately led to a breach of the peace. There can be no conviction for *peacefully* exercising the right of free speech. This is consistent with the principle that one may be found guilty of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. *Cantwell* v. *Connecticut,* supra. Under the statute here in question, so long as the speech was *peaceful*—regardless of whether it invited dispute, brought about a condition of unrest or stirred people to anger—a conviction was not warranted.

By this statute, the State of Mississippi proscribes only nonpeaceful speech, speech calculated to cause or likely to cause a shattering of peace and order, which the state has a right to do. This limitation on speech is within the state's constitutional power. As interpreted by the state courts in this case, Miss. Code Ann. § 2089.5 (1966 Supp.) is not unconstitutional.

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II.

The petitioner also contends that his state convictions, based upon the actions taken by him, constitute punishment for the exercise of free speech and that, therefore, these convictions should be invalidated. In *Feiner* v. *New York,* supra, a similar contention was presented to and rejected by the Supreme Court. In *Feiner,* the petitioner urged in a loud, high-pitched voice that Negro citizens rise up in arms and fight for civil rights. The crowd in *Feiner* was described as restless and was said to have been pushing, shoving and milling around. At least one member of the crowd threatened violence. The Supreme Court in affirming the petitioner's conviction said:

> The findings of the [state] courts as to the condition of the crowd and refusal of the petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of the petitioner . . . does not exceed the bounds of proper police action.
>
> 95 L. Ed. at 300.

The court further said that it was well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker or to break up an otherwise lawful, public meeting. But, where, said the court, the speaker "passes the bounds of argument and persuasion and undertakes incitement to riot, the police are not, in the name of free speech, powerless to prevent a breach of the peace".

In *Edward* v. *South Carolina,* supra, and *Cox* v. *Louisiana,* supra, the court noted that the factual situation in those two cases was a "far cry" from the situation presented in *Feiner,* for in *Edwards* and *Cox,* there was

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no violence or threat of violence on the part of any member of the crowd there involved. In the present case, as in *Feiner,* there is ample evidence to support a jury conclusion that the crowd was restless and potentially dangerous; there is testimony that it was tense—the petitioner admits that the people making up the crowd seemed shocked at the outcome of the trial which they were attending—there is testimony from three experienced police officers that in their opinion mob violence was imminent; there is testimony of some pushing and crowding in and around the entrance to the building.[7] In spite of these similarities, the petitioner urges that *Feiner* is not applicable, but that *Edwards* and *Cox* control. With this contention, this court does not agree.

The state court concluded, at least inferentially, that the petitioner's conduct in light of the surrounding circumstances, exceeded the bounds of argument and persuasion and was calculated to or could have led to a breach of the peace. This court cannot say that such a conclusion is wrong. The evidence was sufficient to warrant the jury verdicts. Therefore, this court holds that petitioner was not convicted of conduct protected by the First and Fourteenth Amendments, and his arrest and conviction did not exceed the bounds of proper state police action.

III.

Finally, petitioner argues that there is no evidence to support his convictions. From what has already been said,

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[7] Which also housed the city jail. It has recently been held that First Amendment freedoms were not violated by the arrest and conviction of civil rights demonstrators for trespassing upon the curtilage of the county jail. *Adderly* v. *Florida,* —— U.S. ——, 17 L. Ed. 2d 149 (1966).

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it is apparent that there is no merit in this contention, and this court now so finds.

This court judicially knows that over almost all the length and breadth of this country, speeches cast in strikingly similar language, protesting police action in what petitioner here calls "a vigorous and stirring nature", have preceded barbaric savagery, bloodshed, death, looting and the wanton destruction of millions of dollars of property. The roll of the places where peace and order were not maintained—where the thin veneer of civilization was torn asunder—where the faceless mob ran rampant, unchecked by the forces of law and civilization—is a long and disgraceful one: Watts, Hough, Rochester, Trenton,....

In Greenville prompt and efficient police work, which went directly to the source of trouble and then established unquestioned control, which was promptly followed by dispersal of what petitioner's counsel describes as a "mob", probably averted what could have been another such tragic occurrence in that community.

More, much more, than the simple arrest of a "civil rights worker" is involved here. At stake, is the right of a community to preserve the peace and to protect itself from riots and disorder.

The petitioner has been afforded every protection of the law. He has had his day in the Police Court of Greenville, in the County Court, in the Circuit Court, in the Supreme Court of Mississippi, and his petition to the Supreme Court of the United States for review of his convictions has been considered and denied. He now has had his day in this court. The record here is unchanged. He offered no new evidence. The time has come, in fact the time is long overdue, for this litigation to come to

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an end. It is right, it is constitutional (sometimes apparently not the same) for this book to be closed. Insofar as this court is concerned, it is.

An order will be entered to deny the Great Writ to this petitioner, since the record shows that he is not entitled to the extra-ordinary protection which it affords.

This the 29th day of December, 1967.

CLAUDE F. CLAYTON
Claude F. Clayton
UNITED STATES CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

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Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 43,429

CHARLES MCLAURIN,

—v.—

CITY OF GREENVILLE.

INZER, Justice:

Appellant, Charles McLaurin, was convicted on a charge of disturbance of the public peace in violation of Mississippi Code Annotated section 2089.5 (Supp. 1964) in the Municipal Court of the City of Greenville. He appealed to the County Court of Washington County, where he was tried *de novo* before a jury. This trial resulted in a conviction, and he was sentenced to pay a fine of $100 and serve a term of ninety days in the city jail. From this conviction, he appealed to the circuit court, wherein the conviction was affirmed. The circuit judge allowed an appeal to this Court because of the constitutional question involved.

When this case reached this Court, it was consolidated with three other cases for the purposes of argument and submission to the Court. They are Cause No. 43,436,

which is a similar charge against Charles Cobb; Cause No. 43,497, which is a charge against this same appellant, Charles McLaurin, for resisting arrest; and Cause No. 43,498, which is a similar charge against Charles Cobb. The cases will be disposed of by separate orders. After the cases were submitted, it was discovered that the affidavits upon which these charges were based were not a part of the record; although they had been so designated by appellants in their notice of designation of record. The attention of counsel for the City and appellants was directed to this defect. The City suggested a diminution of the record, which suggestion was sustained. The affidavits are now a part of the records in all four cases.

The appellant's assignment of errors is as follows:

I. The court below erred in affirming a judgment of conviction which punishes conduct in the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II. The court below erred in approving the refusal of the trial court to give appellant's instruction that the jury could not find appellant guilty of breach of the peace if the police officers had made no reasonable effort to calm or disperse appellant's audience.

III. The court below erred in affirming a judgment of conviction based upon no evidence of guilt.

IV. The court below erred in affirming a judgment of conviction under a statute so vague and indefinite as to permit the punishment of the exercise of the right

of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V. The court below erred in approving the denial by the trial court of appellant's motion to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges.

The proof on behalf of the City is sufficient to show that on July 1, 1963, a large crowd of people were present at the Municipal Court in the City of Greenville where two Negro girls were being tried on a charge of disorderly conduct. The courtroom which is in the municipal building seats about 300 people, and it was filled to capacity. About one-half of the people in the courtroom were Negroes, and one-half were white. There was also a large crowd, consisting of mostly Negroes, on the outside of the courtroom. Appellant was present at the trial, but was not in the courtroom. He had gone into the courtroom prior to the trial and was directed to a seat by Officer Willie Carson; however, he did not sit where Officer Carson directed him to sit, and when Carson spoke to him about it, McLaurin protested that the courtroom was segregated. He then went out of the courtroom and protested to the chief of police about the courtroom being segregated. When he returned to enter the courtroom, it was filled to capacity, and he was not allowed to enter again.

The trial resulted in the conviction of the two girls being tried, and most of the people then departed from the courtroom. Thereafter, although court was still in

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session, McLaurin went outside the building and after talking with some of the people who were present at the trial, he began to shout in a loud voice, attracting the attention of the people who were leaving, and many turned and came back. He backed up on the steps of the building, and in a loud voice began exhorting the crowd of about 200 people, mostly Negroes, which had gathered around him in front of the building. The crowd blocked the sidewalk all the way to the street and the entrances to the building. Officer Carson was on the outside of the building after the trial, and he testified that the crowd around McLaurin appeared to be upset over the outcome of the trial. Officer Carson is a Negro and had been employed on the police force in the City of Greenville for over thirteen years prior to the trial. He holds the rank of detective and has had experience as a military policeman in the armed forces. He said that McLaurin said in a loud voice, "What you people going to do about this; this is wrong, the White Caucasian, this law is wrong; you going to take it; you going to let them get away with it." The crowd began to mutter and say that it wasn't right. It appeared to Officer Carson that the situation was very tense and anything could happen. It was his opinion that McLaurin was exciting the crowd in order to get them to do something about the court's decision. Carson made his way through the crowd to where McLaurin was standing and told him he would have to stop, and that he could not block the sidewalk. McLaurin continued to talk, and once again Carson told him to stop. McLaurin refused, and Carson placed him under arrest. After he was arrested, McLaurin kept pulling back and talking over

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Carson's shoulder to the crowd, saying, "He's arresting me, what are you going to do about it." In order for Carson to get McLaurin into the building and out of the crowd, it was necessary for him to use all of his strength.

Captain Harvey Tackett, also a member of the City Police Force, was in front of the police station after the trial. He said that the first time he saw McLaurin, he was in the middle of the sidewalk in front of the station, and McLaurin started waving his arms and shouting in a loud voice to the people that were leaving. Most of the people immediately came back and gathered around McLaurin who then "jumped" upon the steps of the building and continued to shout and holler, asking the people what they were going to do about what had happened. The crowd started mumbling and saying something that he could not understand, but they appeared to be agreeing with McLaurin. It was his opinion that the crowd was about to take the situation into their own hands, and he thought that a breach of peace was imminent. He had had long experience in police work, and it was his opinion that McLaurin would have to be removed or there would likely be a riot. He started over to where McLaurin was standing, but before he reached him, Officer Carson reached McLaurin and said something to him, which Captain Tackett could not hear. McLaurin kept shouting and hollering and waving his arms, and Carson said something else to him; however, McLaurin continued shouting. Then he saw Carson take McLaurin by the arm and forcibly carry him inside the building. During this time McLaurin was still shouting to the crowd.

Chief of Police W. C. Burnley was also present at the scene and saw and heard what transpired. He had been

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on the police force in Greenville for seventeen years and was a graduate of the FBI National Academy. He had received special training in methods relative to dealing with crowds. It was his opinion that the situation on the outside of the building was very tense. He saw McLaurin "jump" to the steps of the building and begin to shout and wave his arms in an emotional manner. He saw the people gather around him and many that were leaving turned and came back. He heard McLaurin shout, "Are you going to take this; what are you going to do about it," repeating these words over and over and other statements that he could not remember. It was his opinion that the speech of McLaurin was having an emotional effect upon the already tense crowd, and that any moment a riot or some other violence could take pace.

Charles Cobb who was a Field Secretary employed by the Student Non-violent Co-ordinating Committee testified in behalf of appellant. It was his testimony that he saw McLaurin when he entered the courtroom and saw Officer Carson go up to him and say something. McLaurin then left, and Cobb went out to ascertain why McLaurin had left. He went with McLaurin to protest to Chief Burnley relative to segregation in the courtroom, and when they returned, they were not allowed to enter the courtroom. When the trial was over, he left McLaurin and went outside. When he next saw McLaurin he was standing on the sidewalk saying something to the people gathered there. He estimated that there were about 100 Negroes on the sidewalk in front of the municipal building. As McLaurin was talking he backed up the steps of the building, and although

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he was only twenty to thirty feet from McLaurin, he said he could not hear what McLaurin was saying. He saw one of two police officers say something to McLaurin, who continued talking. The officers then carried McLaurin into the municipal building. It was his opinion that the crowd did not appear to be so upset that they would do anything violent; he thought that they were mostly curious.

Appellant testified in his own behalf and said that he had been in Greenville off and on for about nine and one-half months. He was a Field Secretary for the Student Non-violent Co-ordinating Committee, and had been engaged in voter registration work during the time he had been in Greenville. He was also affiliated with other groups engaged in civil rights work, including a group of which the two Negro girls being tried were members. When he first went into the courtroom, he was directed to take a seat on the right side of the room, but he saw a vacant seat on the left side and sat there. He assumed that since he was directed to the right side where the Negroes were sitting that the left side was reserved for whites. After he sat down, Officer Carson told him he could not sit there. He asked Carson whether the courtroom was segregated, and Carson told him to come to the back of the room with him. He followed Carson out of the courtroom, but Carson didn't say anything else to him. He and Charles Cobb went to talk with Chief Burnley about the courtroom being segregated, and Burnley told them that they were in the room once, and turned and walked away from them. He was not allowed to re-enter the courtroom, and stayed outside during the trial. After the trial, he then walked outside of the

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municipal building and began talking with some of the people who were present at the trial. He moved to the front of the building, and it appeared to him that the people coming out were shocked by the conviction of the girls. He said he started trying to get the attention of the crowd to tell them about registering and voting so that this kind of thing could not happen. Officer Carson then came up and told him that he could not make a speech without a permit, and when he continued to talk, Carson arrested him and carried him inside the building. He said, "I was saying different things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50 per cent of the population is Negro and that they could have used the park or anyother (sic) thing had they been registered voters." He was asked whether the crowd appeared angry and in a tense and angry mood, and he replied, "I feel that the crowd was sorta upset as to the out come (sic) of the trial, but certainly the words that I was using wouldn't have caused them to jump—to go in there and try to beat up the Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified." On cross-examination, he admitted that during the entire time he had been in Greenville he had not been interfered with in any way in his voter registration work. He said Negroes were allowed to register without interference, although some did not pass the test. Most of his work had been with groups under the voting age, and he had not been interfered with in any way in this work.

We will first address ourselves to the question of whether the circuit court was in error in affirming the action of the trial court, in overruling a motion of appellant to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges. Appellant contends that the trial court refused to allow him to show a pattern or practice of systematic exclusion by peremptory challenges by the City. This contention is not supported by the record in this case. The record reflects that the trial judge did at first deny appellant's motion to be allowed to show that the City had peremptorily challenged two Negroes, but immediately thereafter, she rescinded that ruling and granted appellant's motion. Appellant offered no further evidence in support of the motion to show that the City had followed the practice of systematically excluding Negroes by means of peremptory challenges. After the jury was selected, appellant made a motion to quash the panel because of systematic exclusion of Negroes therefrom because of race and color. He does not contend that the evidence in the record is sufficient to show a prosecutorial abuse of the peremptory challenges, but contends that this case should be remanded to give the appellant an opportunity to explore this matter further. There is no merit in this contention. In this connection, it is interesting to note that in Cause No. 43,498, which involves an appeal from McLaurin from a conviction on a charge of resisting arrest, wherein the City did not exercise its peremptory challenges to excuse Negroes from the jury panel, appellant made a motion to quash the panel because of systematic inclusion of Negroes. This position

taken by appellant is without merit and deserves no further discussion. *Swain* v. *Alabama*, 380 U. S. 202, 85 Sup. Ct. 824, 13 L. Ed. 2d 759 (1965).

The question of whether appellant's conduct in this case is protected by the First and Fourteenth Amendments to the Constitution of the United States presents the important question. It is appellant's contention that his speech was merely a protest against segregated conditions in Greenville and the fact that it made the crowd restive and angry does not support a conviction for a breach of public peace. In support of this condition, he cites and relies upon the case of *Terminiello* v. *Chicago*, 337 U. S. 1, 69 Sup. Ct. 894, 93 L. Ed. 1131 (1949). *Terminiello* was convicted of a violation of a city ordinance forbidding any breach of peace. The decision turned on the construction placed upon the ordinance by the trial court as reflected by the instructions to the jury. The court held that the construction was as binding upon it as though the precise words had been written into the ordinance. The conviction was reversed because the ordinance as construed by the Illinois court was at least partly unconstitutional. Appellant contends that he has been convicted of expressing unpopular views, and the construction of Mississippi Code Annotated section 2089.5 (Supp. 1964) by the trial court comes within the rule announced in *Terminiello, supra.* This directs our attention to the construction placed upon the statute by the trial court. This is reflected by the instructions to the jury as requested by the City and by the appellant. The court instructed the jury that if appellant was arrested for public protest against racial segregation, then they could not find

the defendant guilty. The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional.

Appellant also urges that section 2089.5 is so vague and indefinite as to permit the punishment of the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. His argument is based upon the contention that as applied here the term "breach of peace" reaches federally protected activities that create unrest in others. The statute as drawn is in broad terms, but it is not unconstitutional upon its face. It is true that it could be construed in such a manner that it would reach federally protected activities, but we are well aware of the fact that neither this statute nor any other statute may be constructed so as to infringe upon the state or federally protected constitutional rights of appellant or any other person. This is evidenced by many decisions of this Court, including our decision in the case relative to the two girls whose conviction resulted in this action. *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965); *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

We find no merit in the assignment of error relative to the refusal of the trial court to grant appellant an instruction to the effect that the jury could not find appellant guilty of a breach of peace if the police officer made no reasonable effort to calm or disperse the crowd. We do not understand the law to be that when an officer is faced with a situation such as Officer Carson was confronted with in this case, where there was a clear and present danger of a riot or disturbance of court then in session, that such officer must, before arresting the person who is creating the danger, attempt to disperse the crowd. Such an attempt might well trigger the imminent danger, and in such cases, the officer must use his best judgment in determining the means or manner in which to prevent the threatened danger. The arrest of appellant and the subsequent arrest of Charles Cobb enabled the officers to control the situation that otherwise might have created a riot beyond control. The factual situation in this case is somewhat similar to the facts in the case of *Feiner* v. *New York,* 340 U. S. 315, 71 Sup. Ct. 303, 95 L. Ed. 295 (1951), wherein the court quoted from *Cantwell* v. *Connecticut,* 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940), where it is said:

> The language of *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have hardihood to suggest that the principle of

> freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at 308. . . . (340 U. S. at 320, 71 Sup. Ct. at 306, 95 L. Ed. at 300.)

The factual situation involved in this case is entirely different from the situation involved in the cases of *Cox* v. *Louisiana*, 379 U. S. 85 Sup. Ct. 453, 13 L. Ed. 2d 471 (1965), and *Wright* v. *Georgia*, 373 U. S. 284, 83 Sup. Ct. 1240, 10 L. Ed. 2d 349 (1963), and these cases do not control.

Appellant's contention that there was no evidence of appellant's guilt of the charge is without merit. This contention is based solely upon the proposition that appellant's acts were constitutionally protected, and we hold that they were not for the reasons heretofore stated.

We have carefully considered all the questions raised by the appellant in this case, and we are of the opinion that there was ample evidence from which the jury could find that appellant was guilty of the offense charged. The constitutional rights of the appellant were fully protected, and this conviction must be affirmed.

Affirmed.

All justices concur.